

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NEXTUNE, INC.,

Plaintiff,

V.

ROBERT BUCKNER MCKINNEY,
et al.,

C12-1974 TSZ

ORDER

Defendants.

THIS MATTER comes before the Court on Defendant Christopher Scott Harrison's Motions to Dismiss Pursuant to FRCP 12(b)(2) and 12(b)(6), docket nos. 10, 15. Having considered the pleadings, and all declarations and exhibits filed in support of and opposition to the motions, the Court enters the following Order.

I. Background

Plaintiff, nexTUNE, Inc., brings this action for misappropriation of trade secrets against EMI Music North America (“EMI”) and EMI’s outside counsel, Buck McKinney and Christopher Harrison. nexTUNE alleges that Defendants improperly acquired its trade secrets through the guise of a threatened copyright lawsuit and may have shared them with nexTUNE’s competitors.

1 nexTUNE is a company licensed and incorporated in the state of Washington that
2 provides digital music services to individuals and companies. Amended Complaint
3 (hereinafter “Complaint”) at ¶¶ 1, 13, docket no. 18. EMI sent nexTUNE a “Cease and
4 Desist” letter on April 24, 2012, accusing nexTUNE of copyright infringement. Id. at
5 ¶ 8. In early July 2012, Mr. McKinney sent Michael DuKane, nexTUNE’s President and
6 CEO, a letter seeking certain information from nexTUNE in connection with EMI’s
7 claims of copyright infringement. Id. at ¶ 12. The requested information included: (1) “a
8 detailed description of nexTUNE’s digital music services,” (2) “a detailed description of
9 the manner in which nexTUNE’s commercial music services are delivered to its
10 customers,” (3) “a detailed description of the functionality of the nexTUNE Media
11 Player 1, including without limitation, a description of the manner in which content is
12 stored on the device,” and (4) “a list of all nexTUNE customers who have received EMI
13 content, all nexTUNE sales and revenue received from EMI content, and a list of all
14 sound recordings in nexTUNE’s library, and all sound recordings used by nexTUNE over
15 the prior 3 years.” Id. at ¶ 13.

16 Mr. DuKane responded, agreeing to provide the requested information. Id. at
17 ¶ 13; Exhibit A to EMI’s Answer and Counterclaim, docket no. 32. His response letter
18 to Mr. McKinney provided, in relevant part:

19 [W]e will of course provide the information you requested and work
20 diligently to resolve any issues.

21 nexTUNE has spent more than 6 years developing unique intellectual
22 properties with the intent to promote the use of licensed music for
23 businesses that traditionally have engaged in unlicensed activity. As such,
some of your requests are considered to be highly confidential and of a

1 trade secret. I respectfully request that we agree on the confidentiality of
2 the information we provide, especially as it relates to our technologies. We
3 are a small company in a land of giants and our ability to compete in the
marketplace of business music would be greatly diminished without such
confidentiality.

4 I would also like to make myself available to meet with you at your office
in Austin this week or early next week to address this matter and to confirm
5 an agreement of confidentiality.

6 Id. nexTUNE alleges that in a subsequent phone conversation, Mr. McKinney agreed to
7 maintain nexTUNE's documents and information as confidential. Complaint at ¶ 14.
8 Following this exchange, Mr. DuKane sent Mr. McKinney the requested information. Id.
9 at ¶ 15.

10 On September 7, 2012, Mr. DuKane travelled to Austin, Texas, to meet with Mr.
11 McKinney concerning EMI's claims of copyright infringement. When he arrived at Mr.
12 McKinney's office, Mr. DuKane was introduced to "Chris," who Mr. McKinney
13 explained would be assisting him with the evaluation of nexTUNE's documents. Id. at
14 ¶ 16. During the meeting, "Chris" reviewed a copy of the documents nexTUNE had
15 provided to Mr. McKinney. Id. at ¶ 17. At the end of the meeting, Mr. DuKane learned
16 that "Chris's" full name was Christopher Harrison. Mr. DuKane recognized that Mr.
17 Harrison had previously been employed by DMX, a large direct competitor of nexTUNE.
18 Id. at ¶ 19. nexTUNE alleges that Mr. Harrison has worked for DMX and Mood Media,
19 and is presently employed by Pandora, all direct competitors of nexTUNE. Id. at ¶¶ 22-
20 24.

21 nexTUNE filed suit against EMI, Mr. McKinney, and Mr. Harrison on November
22 11, 2012, alleging non-infringement of EMI's copyrights under federal law and
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1 misappropriation of trade secrets under the Washington Uniform Trade Secrets Act,
2 RCW 19.108.010, et seq. With respect to the second claim, nexTUNE alleges that the
3 Defendants intentionally acquired nexTUNE's trade secrets by improper means and may
4 have intentionally disclosed nexTUNE's trade secrets to Mr. Harrison's employers or
5 may do so in the future. Complaint at ¶¶ 25, 26. nexTUNE seeks declaratory and
6 injunctive relief prohibiting Defendants from using or disclosing its trade secrets,
7 damages, and attorney fees and costs. Complaint at 9.

8 Mr. Harrison filed two motions to dismiss the trade secret misappropriation claim
9 against him in December 2012. He moves to dismiss the claim for lack of personal
10 jurisdiction under Federal Rule of Civil Procedure ("FRCP") 12(b)(2), docket no. 10, and
11 for failure to state a claim under FRCP 12(b)(6), docket no. 15. The Court issued a
12 minute order on January 29, 2013, allowing for additional discovery on the issue of
13 jurisdiction. Docket no. 25.

14 The Court will address Mr. Harrison's motion to dismiss for lack of personal
15 jurisdiction first. If the Court lacks jurisdiction, it does not have authority to decide the
16 motion to dismiss under Rule 12(b)(6). See, e.g., County of Nassau v. New York, 724
17 F.Supp.2d 295, 300 (E.D. N.Y. 2010).

18 **II. Standard**

19 In response to a motion to dismiss for lack of personal jurisdiction, the plaintiff
20 bears the burden to establish that personal jurisdiction exists. See Lee v. City of Los
21 Angeles, 250 F.3d 668, 692 (9th Cir. 2001). Where, as here, a district court rules on a
22 defendant's motion to dismiss under FRCP 12(b)(2) without holding an evidentiary

1 hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to
2 withstand the motion to dismiss. Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995).
3 In deciding whether a prima facie case has been made, the “uncontroverted allegations in
4 the plaintiff’s complaint must be taken as true, and conflicts between the facts contained
5 in the parties’ affidavits must be resolved in the plaintiff’s favor.” AT&T v. Compagnie
6 Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996). However, only the “well pled facts
7 of plaintiff’s complaint, as distinguished from mere conclusory allegations, must be
8 accepted as true.” Wenz v. Memery Crystal, 55 F.3d 1503, 1505 (10th Cir. 1995).

III. Discussion

10 In the present case, nexTUNE concedes that general jurisdiction is lacking, but
11 argues that the Court has specific jurisdiction over the Defendants. In order for a plaintiff
12 to establish specific jurisdiction over a non-resident defendant, it must establish that: (1)
13 the defendant purposefully directed his activities at the forum; (2) plaintiff's claims arise
14 out of the forum-related activities; and (3) the exercise of jurisdiction over the defendant
15 is reasonable. Brayton Purcell LLP v. Recordon & Recordon, 660 F.3d 1124, 1128 (9th
16 Cir. 2010). The plaintiff bears the burden of satisfying the first two elements and if it
17 fails to establish either of them, specific jurisdiction over the nonresident defendant does
18 not exist. Schwartzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004)
19 (citations omitted). If the plaintiff satisfies the first two elements, the burden shifts to the
20 defendant to demonstrate that the exercise of jurisdiction would not be reasonable. Id.
21 (citations and quotations omitted).

1 **1. Purposeful Direction**

2 In order to satisfy the purposeful-direction element in cases in which tortious
3 conduct is alleged by the plaintiff, the Ninth Circuit requires that the actions of the
4 nonresident defendant be purposefully directed at the forum based on “an effects test that
5 focuses on the forum in which the defendant’s actions were felt, whether or not the
6 actions occurred within the forum.” Marvix Photo, Inc. v. Brand Technologies, Inc., 647
7 F.3d 1218, 1228 (9th Cir. 2011). This “effects test” is based on the Supreme Court’s
8 decision in Calder v. Jones, 465 U.S. 783 (1984), and requires that the nonresident
9 defendant (1) commit an intentional act, (2) that was expressly aimed at the forum state,
10 and (3) that caused harm that the nonresident defendant knew would likely be suffered in
11 the forum state. Rio Properties Inc. v. Rio International Interlink, 284 F.3d 1007, 1019-
12 20 (9th Cir. 2002) (citing Calder, 465 U.S. at 788-890).

13 In order to satisfy the first element of the effects test, the plaintiff must establish
14 that the defendant committed an intentional act. Plaintiff argues that Mr. Harrison
15 intentionally acquired nexTUNE’s trade secrets and that he “may have” disclosed the
16 trade secrets to DMX, Mood Media, or Pandora. Plaintiff supports this argument with a
17 citation to Mr. Harrison’s deposition testimony that he entered into a fee sharing
18 agreement with Mr. McKinney in which they agreed to split fees earned through joint
19 prosecution of copyright infringement claims on behalf of clients such as EMI.
20 Plaintiff’s Supplemental Opposition to Defendant’s Motion to Dismiss at 4, docket no.
21 35. The Court concludes that this is insufficient to demonstrate that Mr. Harrison
22 intentionally acquired nexTUNE’s trade secrets.

1 The Complaint alleges that Mr. McKinney requested certain information from
2 nexTUNE, that nexTUNE informed Mr. McKinney that the information contained trade
3 secrets, and that Mr. McKinney agreed to keep the information confidential. The
4 Complaint does not allege that Mr. Harrison requested any information from nexTUNE
5 or that he otherwise improperly acquired information from nexTUNE. It appears that Mr.
6 Harrison reviewed documents that were provided to him by either EMI or Mr. McKinney
7 in connection with his representation of EMI in relation to allegations of copyright
8 infringement against nexTUNE. These facts do not establish that Mr. Harrison
9 “intentionally acquired nexTUNE’s trade secrets.”

10 nexTUNE argues that for purposes of a motion to dismiss for lack of personal
11 jurisdiction, it is sufficient for a plaintiff to allege that the defendant committed an
12 intentional act because the court must presume that the facts set forth by the plaintiff can
13 be proven. Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir.
14 2000). While this proposition is generally true, this Court is not required to credit mere
15 conclusory allegations. Wenz, 55 F.3d 1 at 1505. Here, viewing the Complaint in the
16 light most favorable to nexTUNE and assuming that all facts set forth in the Complaint
17 can be proven, the Complaint does not support the inference that Mr. Harrison
18 “intentionally acquired” nexTUNE’s trade secrets or engaged in any other intentional act
19 to support jurisdiction.

20 However, assuming for purposes of argument only, that nexTUNE has met its
21 burden to demonstrate that Mr. Harrison committed an intentional act, nexTUNE fails to
22 show that Mr. Harrison’s intentional acquisition of nexTUNE’s trade secrets was
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1 “expressly aimed at the forum state.” The second element of the effects test is “satisfied,
2 and specific jurisdiction exists, when a defendant is alleged to have engaged in wrongful
3 conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum
4 state.” Washington Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 675 (9th Cir.
5 2012). The Ninth Circuit has clarified, however, that foreign acts with foreseeable effects
6 in the forum state do not always give rise to personal jurisdiction. Bancroft & Masters,
7 223 F.2d at 1087. “Instead, . . . ‘something more’ is required to establish that the
8 defendant expressly aimed its conduct at the forum.” Medinah Mining, Inc. v.
9 Amunategui, 237 F.Supp.2d 1132, 1137 (D. Nev. 2002). In order for the “express
10 aiming” element of the effects test to be satisfied, the defendant must know that the
11 plaintiff is a resident of the forum state and that the harm resulting from the intentional
12 act will be suffered in the forum state. Bancroft & Masters, 223 F.2d at 1087. Thus, the
13 question is whether Mr. Harrison knew that nexTUNE’s principal place of business was
14 in Washington, purposefully targeted nexTUNE in Washington, and knew that harm in
15 Washington was reasonably foreseeable. nexTUNE has failed to meet its burden of proof
16 on the express aiming element of the effects test.

17 nexTUNE argues that the Court should conclude Mr. Harrison knew that
18 nexTUNE was located in Washington because he had, several years earlier, received an
19 e-mail from Mr. DuKane which included a signature block with a Redmond address.
20 Plaintiff’s Supplemental Opposition to Defendant’s Motion to Dismiss Pursuant to FRCP
21 12(b)(2) at 5, docket no 35. This argument is not persuasive. A single e-mail received
22 from an out-of-state plaintiff years prior to the events giving rise to litigation is not

1 sufficient to demonstrate that the defendant targeted “a plaintiff whom the defendant
2 knows to be a resident of the forum state.” Washington Shoe Co., 704 F.3d at 675. If
3 this was sufficient to support a finding that Mr. Harrison knew that nexTUNE was a
4 Washington resident, every unsolicited e-mail could be a potential basis for concluding
5 that the recipient knew the location of the sender’s business for purposes of personal
6 jurisdiction. Here, nexTUNE has failed to demonstrate that the single e-mail from Mr.
7 DuKane to Mr. Harrison was part of an ongoing business relationship or otherwise
8 resulted in any type of personal relationship through which Mr. Harrison might
9 reasonably be imputed to have knowledge of nexTUNE’s business residence.

10 nexTUNE also claims that Mr. Harrison knew that nexTUNE was located in
11 Washington because the Defendants sent a letter addressed to nexTUNE in Redmond,
12 Washington,” requesting information containing trade secrets. Plaintiff’s Supplemental
13 Opposition to Defendant’s Motion to Dismiss Pursuant to FRCP 12(b)(2) at 5. This
14 argument is inconsistent with the Complaint and belied by Mr. Harrison’s declaration.
15 See Complaint at ¶¶ 12-13. Mr. Harrison submitted a declaration in support of his
16 motion to dismiss stating:

17 I first met with nexTUNE’s Chairman and President Michael Dukane on
18 September 7, 2012 in Austin, Texas. Prior to this meeting, as a legal
19 representative of EMI I had not telephoned or directed correspondence to
nexTUNE. As a legal representative of EMI, the September 7, 2012 meeting
in Austin, Texas was the only contact that I had with nexTUNE.

20 Harrison Decl. at 2, docket no. 11. Plaintiff has failed to demonstrate that Mr. Harrison
21 targeted a company that he knew to be a resident of the forum state.

1 nexTUNE also fails to meet the third element of the effects test with respect to Mr.
2 Harrison. This element requires the plaintiff to demonstrate that an intentional act
3 “caused harm that the nonresident defendant knew would likely be suffered in the forum
4 state.” Rio Properties, 284 F.3d at 1019-20. The third prong “is satisfied when [a]
5 defendant’s intentional act has foreseeable effects in the forum.” Brayton Purcell LLP,
6 606 F.3d 1131. nexTUNE has not demonstrated that Mr. Harrison’s review of
7 nexTUNE’s documents caused harm in Washington. The Complaint alleges that Mr.
8 Harrison “may have” used or disclosed nexTUNE’s trade secrets. Complaint at ¶¶ 26-27.
9 These allegations are nothing more than speculation and do not support the conclusion
10 that any harm occurred in Washington.

11 The Court concludes that nexTUNE has failed to meet its burden to demonstrate
12 that Mr. Harrison’s conduct was purposefully directed at the forum state. Plaintiff has
13 alleged no facts demonstrating that Mr. Harrison was involved in soliciting the
14 documents from nexTUNE for EMI or otherwise took part in any communication with
15 nexTUNE other than a single face to face meeting with Mr. DuKane in Austin, Texas.
16 Apparently, Mr. Harrison was engaged as co-counsel by EMI to assist with the
17 prosecution of alleged copyright infringement by nexTUNE and remained in that role
18 until November 2012, when he accepted an offer of employment in California. Answer
19 and Counterclaim at 11; Harrison Decl. at 2. The facts pleaded are insufficient to
20 establish that Mr. Harrison “engaged in wrongful conduct targeted at the plaintiff whom
21 defendant [knew] to be a resident of the forum state,” Dole Food Co., Inc. v. Watts, 303

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1 F.3d 1104, 1111 (9th Cir. 2002), and that the alleged wrongful conduct resulted in harm
 2 being suffered in the state of Washington. Rio Properties, 284 F.3d at 1019-20.

3 nexTUNE argues that Spank! Music and Sound Design Inc. v. Hanke, et al., 2005
 4 WL 300390 (N.D. Ill. 2005) supports a finding of personal jurisdiction. That case is not
 5 helpful because the court concluded that the defendants had sufficient contacts with the
 6 forum state to support personal jurisdiction. There, the plaintiff, a company located in
 7 Chicago, Illinois, opened a satellite office in California. Id., at *1. Defendants were
 8 hired to work in the California office. Several years later, plaintiff sued defendants for
 9 soliciting plaintiff's clients, misappropriating plaintiff's confidential and proprietary
 10 information, and leaving plaintiff with various debts. Id. Defendants argued that
 11 personal jurisdiction was lacking in Illinois. Id.

12 In response, plaintiff argued that jurisdiction was proper because the defendants'
 13 contact with the Chicago headquarters provided sufficient minimum contacts to support
 14 the exercise of jurisdiction in Illinois.¹ Further, plaintiff contended that jurisdiction was
 15

16 ¹ Defendants' contacts with the Chicago office included the following:
 17

18 Braverman was interviewed in Chicago and was extended an offer from Spank's Chicago
 19 office. Further, Braverman traveled to Chicago at Spank's expense to undergo five days
 20 of training and received paychecks and benefits issued from Spank's Illinois
 21 headquarters. Spank asserts Jones traveled to Chicago at Spank's expense to undergo
 22 four days of training at Spank's headquarters. In addition, Jones traveled to Illinois on
 23 Spank business on at least three occasions, and her paychecks and benefits were issued
 from Spank's Illinois headquarters. Spank indicates both Jones and Braverman reported
 to superiors in the Chicago office on a daily or weekly basis, communicated via phone,
 fax and e-mail with Chicago personnel, and regularly submitted expense reports, sales
 materials, purchase orders, job estimates, vendor invoices, client contracts, session sheets
 and other materials to Spank's Chicago office. Spank emphasizes neither defendant
 claims she did not know she was employed by an Illinois company or that she could not

1 appropriate under the “effects doctrine.” Id., at *2. The Seventh Circuit concluded that
 2 “defendants have sufficient minimum contacts with Illinois to satisfy personal
 3 jurisdiction requirements.” Id., at *3. Although the Court noted that the plaintiffs argued
 4 that jurisdiction was proper under the “effects doctrine,” it does not appear that the Court
 5 relied on the effects test to establish personal jurisdiction.

6 The Court concludes that Spank! Music and Sound Design is distinguishable.
 7 Here, nexTUNE has not demonstrated that Mr. Harrison had any contacts with the forum
 8 state. In addition, nexTUNE has not demonstrated that Mr. Harrison knew that
 9 nexTUNE was located in the forum state. Committing a “foreign act with foreseeable
 10 effects in the forum state” is insufficient to support personal jurisdiction in the Ninth
 11 Circuit. Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1157-58 (9th Cir. 2009).

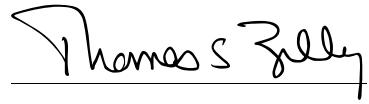
12 Plaintiff argues, in essence, that Mr. Harrison’s review of documents that
 13 nexTUNE voluntarily provided to Mr. McKinney/EMI in an attempt to resolve EMI’s
 14 copyright infringement claims constitutes intentional misappropriation and that
 15 jurisdiction is proper in Washington because nexTUNE is located in Washington. This is
 16 insufficient to support the exercise of specific jurisdiction over Mr. Harrison. Because
 17 Plaintiff has failed to make a *prima facie* showing that Mr. Harrison purposefully directed
 18 his activities at the form, the Court declines to address the second and third elements of
 19 the test for specific jurisdiction.

20
 21 readily anticipate that any complaints regarding her employment would originate in
 Illinois.

22 Id. at *2.
 23

1 The Court GRANTS the motion to dismiss for lack of personal jurisdiction under
2 FRCP 12(b)(2), docket no 10.²

3 Dated this 29th day of May, 2013.

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6 THOMAS S. ZILLY
7 United States District Judge

21 ² Because the Court grants Defendant Harrison's motion to dismiss for lack of personal jurisdiction, it is
22 unnecessary to address his alternate motion to dismiss for failure to state a claim under FRCP 12(b)(6),
23 docket no. 15. That motion is STRICKEN as moot.